Central Law Journal.

ST. LOUIS, MO., MAY 3, 1907.

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE AS DEFENSES TO ACTIONS UNDER THE FEDERAL AUTOMATIC COUPLER LAW.

In addition to the fact that the decision in the recent case of Schlemmer v. Railway Company, 27 Sup. Ct. Rep. 407, was by a court divided by the unsatisfactory ratio of five to four, we are far from being convinced by the reasoning of Justice Holmes that the Supreme Court of the United States has upheld its reputation for clear incisive reasoning and convincing logic in failing in that decision to note any distinction between the principles of assumption of risk and contributory negligence, and holding that the exemption of persons injured by defective couplers under the federal automatic coupler act from any rule imposing upon them any assumption of risks incurred in the usual course of business, obviously and deliberately accepted by him, extended to cases where the party injured is clearly proven to have directly contributed to his injury by his own negligence.

In this case Schlemmer the party injured was instructed to couple two cars engaged in interstate commerce which the evidence shows not to have been equipped with automatic couplers as provided by the federal statutes. One of these cars was a shovel car not equipped with buffers, so that a person who in trying to couple the cars should put any part of his person above the bottom of the two cars as they coupled would have been injured by the impact of the two cars. In order to do this with perfect safety he must keep his person on a level with the trucks and below the bottom floors of the two cars. Schlemmer when ordered to couple these two cars was warned of this fact, and just preceding the act of coupling he was warned a second time to "keep your head down." Notwithstanding this warning, twice repeated, he raised his head between the two cars and had the same crushed, resulting in an injury from which he afterwards died. Under this state of facts the Supreme Court of Pennsylvania ordered a non-suit on the ground that the plaintiff's husband directly and proximately contributed to his own injury.

It is difficult to see on what principle the facts above stated can be said to make out a case of assumption of risk and to utterly fail to establish the fact of plaintiff's contributory negligence. And yet, that is the decision of Justice Holmes who declares practically that there is no well-defined distinction between assumption of risk and contributory negligence and then charges the Supreme Court of Pennsylvania with failure to see the distinction which the supreme court itself says is "rather shadowy." Justice Holmes then concludes with this astounding statement which will at once be taken to abolish the defense of contributory negligence in all cases falling within the provisions of the Federal Automatic Coupler Act. Speaking of the two defenses, assumption of risk and contributory negligence, the learned judge said: "But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion), then, unless great care be taken, the servant's rights will be sacrified by simply charging him with assumption of risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as convertible terms."

While we are most sincerely in favor of construing an act so beneficial as the Automatic Coupler Act, with as much generosity as it is possible we are not in favor of permitting its construction to extend its activity beyond the plain meaning of the act and override and strike down other principles of law equally sacred and beneficial, the foundation of which have been laid in the experience of centuries. To say that a man can directly contribute to his own injury by deliberate negligence on his part after repeated warning and then recover from the master for such injury is to do violence to every sense of fairness and of justice, besides violative of one of the most conservative rules of public policy. To say further, as the court does in this case, that there is no distinction between assumption of risk and contributory negligence is amazing to say the least. One has to do with the contract between master and servant, the other with the latter's own deliberate act

and judgment independent of any contract requirement of the master. If a master tells a servant to do such and such a thing and the servant sees the danger or knows the defects of the appliances used and the liability he is incurring, his undertaking to comply with his master's wishes is an assumption of the risks involved. It may be negligence on his part to do what he is doing but it is negligence assumed by contract with his master and of which his master has or ought have knowledge. On the other hand where a servant in the course of his employment does an act not demanded or called for by his master and especially against the doing of which he is warned and such act is clearly an act of negligence the commission of such act on his part amounts to contributory negligence and is effective as a complete defense to a defendant in an action for damages. It might well be that a legislature would deem it wise to relieve a servant injured from such acts of negligence, if one is pleased to call them such, which he is required by his master or the terms of his contract to perform, but no legislature would think for a moment of permitting a man to recover for his own deliberate negligence especially where the master not only did not call upon him to perform such act but against the commission of which he repeatedly warned him.

To fail to discover nothing more than a "shadowy distinction" between these two important principles of the law of master and servant is, to our mind, an admission on the part of the supreme court of the land that fails to reflect any credit on the members of the court concurring in the opinion.

We therefore, believe that the Supreme Court of Pennsylvania had a clearer conception of the law applicable to the facts in this case, especially as evidenced in the following excerpt from the opinion of that learned tribunal: "True, under said act he was not considered to have assumed the risks of his employment, but by this is certainly meant no more than such risks as he was exposed to thereby, and resulted in injury free from his own negligent act. It would hardly be argued that defendant would be liable, under such circumstances, were the employee to voluntarily inflict an injury upon himself by means of the use of the improperly equipped car. And yet it is but a step from contributory negligence to such an act. It seems very clear to us that, whatever view we may take of this case, we are led to the legal conclusion that decedent was guilty of negligence that contributed to his death, and that the plaintiff, however deserving she may be, or however much we regret the unfortunate accident, cannot recover."

NOTES OF IMPORTANT DECISIONS.

TAXATION—RIGHT OF LEGISLATURE TO TAX ONE COUNTY AND NOT ANOTHER FOR ENFORCEMENT OF A GENERAL LAW.—On first impression the recent decision of the Supreme Court of South Carolina in the case of Murphy v. Landrum, 56 S. E. Rep. 850, would seem to be contrary to important principles underlying the law relating to taxation, especially in holding that an act of the legislature of South Carolina, amending the General Dispensary Act of that state, levying a tax of one-half of a mill on counties voting out the dispensary, in order to enforce the dispensary law, was not unconstitutional; denying the contention of the complainant that said act does not create a uniform and equal rate of taxation because not levied on counties which never had dispensaries, and insisting that such a tax is authorized by Const., art. 10, § 6, authorizing a tax "for litigation, quarantine and court expenses."

On mature reflection it is very evident that the holding of the Supreme Court of South Carolina is altogether sound and in perfect keeping with well settled principles. The complainants insisted that the legislature had no right to tax one county and not another for the enforcement of a general act in one county and not in another, because of the constitutional provisions which prohibit the general assembly from authorizing "any county or township to levy a tax or issue bonds for any purpose except for educational purposes, to build and repair public roads, buildings and bridges, to maintain and support prisoners, pay jurors, county officers and for litigation, quarantine and court expenses and for ordinary county purposes, to support paupers and pay past indebtedness." The court, in answering this objection, said: "It is argued that the special levy 'for the purpose of defraying the expenses of the enforcement of the dispensary law in said county under the direction of the governor,' does not fall within any one of the purposes specified, and is therefore prohibited. We regard the language of this section sufficiently broad and comprehensive to include a county tax for the enforcement of the dispensary law within the county, for it will be considered to fall within court expenses, litigation and ordinary county purposes. The result is the same whether we construe the tax as one imposed under the terms of the statute by the county upon itself for a corporate purpose, or as a direct tax by the legisla-

ture upon a county voting out a dispensary for the corporate or public purpose of enforcing the law within the county. The power of the legislature to authorize or impose taxation for a public purpose is undeniable, as shown in State v. Whitesides, 30 S. Car. 580, 9 S. E. Rep. 661, 3 L. R. A. 777, as applied to taxation upon certain townships voting subscriptions to the building of a railroad. The principle of uniformity and equality is subserved when all persons and property in like condition within the particular taxing district assenting to the tax is subject to the tax. If this were a state tax for a general purpose there would be ground to contend that it would not be equal to tax one county and not another, but it is a county tax for county purposes, corporate or public. The statute describes it as a county tax. The fact that the tax is levied to enforce a general statute is of no consequence, since the tax is devoted exclusively to the enforcement of law within the county subject to the tax. A county tax is equal and uniform when applied alike to all persons or property within the county. No such tax is levied in Greenwood and Marlboro counties for the simple reason that such counties do not fall within the conditions and classification upon which the tax is imposed; that is to say, Greenwood and Marlboro, never having had a dispensary, have not voted it out, and have not voted to impose such tax under the terms of the act. There is nothing in the act to prevent the establishment of a dispensary in Greenwood and Marlboro; in fact, the act provides a method by which those counties may have a dispensary if the qualified voters so desire. If these counties should establish dispensaries and thereafter vote to remove them, as they may do under the act, then the conditions would exist which would make Greenwood and Marlboro subject to such tax precisely as all other counties in like situation."

TRIAL — RIGHT OF TRIAL JUDGE TO COMMENT ON EVIDENCE. — The Supreme Court of North Carolina has given a salutary rebuke to the practice of some trial courts in interpolating their personal views in their instructions to juries. In the recent case of Withers v. Lane, 56 S. E. Rep. 855, the court held that an instruction reciting that plaintiff's testimony was contradicted, and placing it in an unfavorable light before the jury, while that of the defendant was treated with greater consideration, was erroneous, as invading the jury's province and intimating the court's opinion as to its weight. The court used the following language in disposing of this question: "The parties had taken issue upon the fact of settlement, and the plaintiff was entitled to have his testimony fairly considered by the jury, even though his statements had conflicted with those of the defendant and another witness. Instead, his testimony was contrasted with that of the defendant in a way which must have discredited him with the jury at the very outset or diminished the force and weight of what he had said. This was a hindrance to him, if not a distinct handicap. The learned and able judge who presided at the trial, inspired no doubt by a laudable motive and a profund sense of justice, was perhaps too zealous that what he conceived to be the right should prevail; but just here the law, conscious of the frailty of human nature at its best, both on the bench and in the jury box, intervenes and imposes its restraint upon the judge, enjoining strictly that he shall not in any manner sway the jury by imparting to them the slightest knowledge of his own opinion of the case. The English practice and also the federal practice permit this to be done, but not ours. With us the jury are the sole and independent triers of the facts, and we hold the right of trial by jury to be sacred and inviolable. Any interference with it is prohibited. The books disclose the fact that able and upright judges have sometimes overstepped the limit fixed by the law; but, as often as it has been done, this court has enforced the injunction of the statute and restored the injured party to the fair and equitable opportunity before the jury which had been lost by reason of the transgression, however innocent it may have been, and we must do as our predecessors have done in like cases."

THE DOCTRINE OF IMPUTED CONTRIBUTORY NEGLIGENCE AS APPLIED TO PERSONS SUI JURIS.

The doctrine of imputed contributory negligence, as applied to infant plaintiffs, and to parents, or representatives suing for injuries to, or the death of infants was fully discussed in an article by Mr. Sumner Kenner of Huntington, Ind., published in the September 29th, 1905, issue of this journal.[1] It is not the purpose to, in the present article, go over the ground covered by that, other than incidentally, but to treat of the doctrine as it is applied to persons other than infants *non sui juris*, concerning which there has been, and still is, a diversity in the decisions of the courts of the different states. The doctrine itself is generally, if not universally, conceded to have its origin in the English case of Thorogood v. Bryan,[2] decided in 1849, where a traveler by omnibus alighting before his omnibus had been pulled up to the curb, and attempting to enter an inn, was run over and killed by another omnibus coming up behind him. In a suit by the adminis-

[1] 61 Cent. L. J. 244.
[2] 8 C. B. 114.

trator, it was held that the negligence of the driver of the omnibus in which deceased rode, in failing to pull up to the curb contributed to the accident and would prevent a recovery, and the reason given by the court for its decision was that deceased was identified with the driver of his omnibus. The rule laid down in this case was followed in other English cases,[3] but the court of admiralty, in a case decided in 1887,[4] refused to follow it and declared its reasoning unsound.

The rule established in Thorogood v. Bryan, has been followed by the Pennsylvania courts as applied to passengers in public conveyances,[5] but the reason for its decision given by the English court pronounced unsound, and its own decision put upon the ground of public policy; but Pennsylvania seems to be the only state in the Union in which the point has been directly decided, whose courts hold that the contributory negligence of a common carrier is to be imputed to his passenger, so as to prevent a recovery for an injury caused by the negligence of another; but as was said by the Supreme Court of Indiana in the case of Town of Knightstown v. Musgrove:[6] "The general principle deducible from the decisions is that one who sustains an injury, without any fault or negligence of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose negligence of duty occasioned the injury even though the negligence of some third person with whom the injured party was not identified as above may have contributed thereto;" and as applied by the courts of the United States to persons *sui juris*, the doctrine of imputed negligence, is based upon the law of principal and agent.[7] The well established rule in the majority of states is that the contributory negligence of a common carrier, or the driver of a hired vehicle is not to be imputed to his passenger,[8] where the passenger assumes no control or direction over the driver.[9] The relation of master and servant does not exist between the hirer of a coach and the driver, and the negligence of the latter cannot be imputed to the former.[10] Where a picnic party had hired a tallyho coach, team and driver, from a livery stable to take it on an excursion to a designated place, and had no control over the driver, other than to tell him when to stop and when to proceed, it was held that a member of the party injured in a collision of the coach with a railroad train, the railroad being guilty of negligence, was not barred from recovering damages against it by any negligence of the driver contributing to the accident.[11] This more reasonable rule also has the sanction of the Supreme Court of the United States,[12] which holds that one who has hired a public hack to take him to a designated point, assuming no control or direction of the driver, is not to have the negligence of the driver imputed to him, to bar him from recovering, against a third person for injury inflicted by his negligence. But the passenger in a hired carriage is not to be relieved from responsibility for his own contributory negligence.

There is more diversity in the decisions of the different states on the question of whether

[3] Armstrong v. Lancashire R. R. Co., 10 Exchg. 47; Budge v. Grand Junction R. R. Co., 3 M. & W. 347; Catlin v. Hills, 65 Eng. Com. Law, 123.

[4] The Bernina, 12 Prob. Div. 58.

[5] Lockhart v. Lichtenthaler, 46 Pa. St. 151; Phil. & Reading R. R. Co. v. Boyer, 97 Pa. St. 91.

[6] 116 Ind. 134, 9 Am. St. Rep. 827.

[7] Bailey v. Citizens Ry. Co. 152 Mo. 448; Sluder v. Transit Co., 189 Mo. 107; Johnson v. City of St. Joseph, 96 Mo. App. 663; Whitaker v. Helena, 14 Mont. 124, 43 Am. St. Rep. 621; Mullen v. City of Owosso, 100 Mich. 103, 43 Am. St. Rep. 436; Prideaux v. City of Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Carlisle v. Sheldon, 38 Vt. 440; Transfer Co. v. Kelley, 38 Ohio St. 86; Cuddy v. Horn, 46 Mich. 596, 41 Am. Rep. 178; Little v. Hackett, 116 U. S. 366.

[8] Becke v. Mo. Pac. Ry. Co., 102 Mo. 544; Wabash, St. L. & Pac. Ry. Co. v. Shacklett, 105 Ill. 364, 44 Am. Rep. 791; Transfer Company v. Kelley, 38 Ohio St. 86; L. & C. Packet Co. v. Mulligan (Ky. 1903), 77 S. W. Rep. 704; Snyder v. Arnold (Ky. 1906), 92 S. W. Rep. 289; Railway Co. v. Harrell, 58 Ark. 454; Randolph v. O'Riorden, 155 Mass. 331; Murray v. Boston Ice Co., 180 Mass. 165, 61 N. E. Rep. 1001; Chapman v. New Haven R. R., 19 N. Y. 341; State v. Boston & Maine R. R. Co., 80 Me. 430; Flaherty v. Minneapolis, etc., Ry. Co., 39 Minn. 329, 12 Am. St. Rep. 655; Phil., etc., R. R. Co. v. Hogeland, 66 Md. 149, 59 Am. Rep. 159; Follman v. City of Mankato, 35 Minn. 522, 59 Am. Rep. 340.

[9] Bennett v. N. J. R. R. & Transportation Co., 36 N. J. L. 225; Cuddy v. Horn, 46 Mich. 596, 41 Am. Rep. 178; Frank Bird Transfer Co. v. Krug (Ind. App. 1903), 65 N. E. Rep. 309; Sluder v. Transit Co., 189 Mo. 107; Bradley v. Ohio River, etc., Ry. Co., 126 N. Car. 735; N. Y. L. E. & W. R. R. Co. v. Steinbrenner, 47 N. J. L. 161.

[10] N. Y. L. E. & W. R. R. Co. v. Steinbrenner, *supra*.

[11] Lewis v. Long Island R. R. Co., 162 N. Y. 52.

[12] Little v. Hackett, 116 U. S. 366.

or not the contributory negligence of the driver of a private carriage, in which the plaintiff is at the time he is injured by the negligence of a third person, to be imputed to him, and bar a recovery against the wrongdoer. In Wisconsin, the rule that it is so imputed is firmly established.[14] The courts of that state holding that there is more reason to impute the contributory negligence of the driver of a private carriage to one riding with him by invitation than to impute that of a common carrier to his passenger; that the person riding by invitation entrusts himself to the care and skill of the driver, assumes the risk of his negligence and makes him his agent. This was also formerly the rule in Iowa,[15] but was repudiated in a later case[16] and is still the rule of the courts of Montana[17] and Michigan,[18] but the far greater weight of authority as well as the better reason, is to the effect that the contributing negligence of the driver of a private vehicle is not to be imputed to one riding with him by invitation. Such is the doctrine of the courts of New York[19] and Pennsylvania, in opposition to the rule in that state in relation to common carriers,[20] of Indiana[21] and now of Iowa,[22] of Missouri,[23] and in a word of the great majority of the states.[24] It was so held in a case where plaintiff was riding in the private buggy of another, at her own request, in order to reach a place to which she was going on her own business.[25] But, though the negligence of the driver of a private vehicle will not be imputed to his guest, yet if the guest is himself negligent, as where he sees the danger and makes no move to avoid, or has a good opportunity to see it and fails to do, he is himself guilty of contributory negligence.[26] There are some cases which hold that the contributory negligence of the husband is to be imputed to his wife, so as to prevent a recovery by her for which another would otherwise be liable in damages. It is so held in Vermont[27] and was at one time in Iowa,[28] but in the later case of Bailey v. Centerville,[29]

[14] Town of Fulton v. Houfe, 28 Wis. 296, 9 Am. Rep. 568; Otis v. Town of Janesville, 47 Wis. 422; Prideaux v. City of Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Ritger v. City of Milwaukee (Wis. Sup. 1898), 74 N. W. Rep. 815.

[15] Payne v. Chicago, Rock Island & Pac. Ry. Co., 39 Iowa, 523.

[16] Nesbit v. Town of Garner, 75 Iowa, 314, 9 Am. St. Rep. 486, a case where plaintiff while driving by invitation in the wagon of a neighbor, was injured by defect in a street.

[17] Whitaker v. Helena, 14 Mont. 124, 43 Am. St. Rep. 621.

[18] Lake Shore, etc., R. R. Co. v. Miller, 25 Mich. 274; Mullen v. City of Owosso, 100 Mich. 103, 43 Am. St. Rep. 436. In this case there is a strong dissenting opinion by Mr. Justice Hooker.

[19] Robinson v. N. Y. Cent. & Hudson River R. R. Co., 66 N. Y. 11, 23 Am. Rep. 1; Dyer v. Erie R. R. Co., 71 N. Y. 228; Masterson v. N. Y. Cent. R. R. Co., 84 N. Y. 247, 38 Am. Rep. 510.

[20] Borough of Carlisle v. Brisbane, 113 Pa. St. 544, 57 Am. Rep. 483; Dean v. Pa. R. R. Co., 129 Pa. St. 514, 15 Am. St. Rep. 733.

[21] Town of Knightstown v. Musgrove, 116 Ind. 124, 9 Am. St. Rep. 827; City of Michigan v. Boecking, 122 Ind. 39; Railroad v. Creek, 130 Ind. 139; Town of Albion v. Hetrick, 90 Ind. 545, 46 Am. Rep. 752. If the passenger, by invitation is not himself negligent, and it is not negligence in itself to ride with the driver. Terre Haute Ry. Co. v. Murray, 98 Ind. 358, 48 Am. Rep. 752. Board of Commissioners of Boone County v. Mutchler, 137 Ind. 140, 36 N. E. Rep. 534.

[22] Nesbit v. Town of Garner, *supra*.

[23] Marsh v. Kansas City Southern Ry. Co., 104 Mo. App. 576, 78 S. W. Rep. 289; Dickson v. Mc. Pac. Ry. Co., 104 Mo. 491; Fechley v. Mo. Traction Co. (Mo. App.), 96 S. W. Rep. 421; Johnson v. City of St. Joseph, 96 Mo. App. 663. Though the wagon in which plaintiff was riding at the time of the accident was being driven by her son, he not having been shown to be in her employ.

[24] Noyes v. Boscowen, 64 N. H. 361, 10 Am. St. Rep. 410; Hot Springs St. Ry. Co. v. Hildreth (Ark. 1904), 82 S. W. Rep. 245; Hydes v. Ferry Turnpike Co. (Tenn. 1902), 67 S. W. Rep. 69; Louisville Ry. Co. v. Anderson (Ky. App. 1903), 76 S. W. Rep. 153; Barnes v. Rumford, 96 Me. 315; Crampton v. Ives, 126 N. Car. 894; Duval v. Atlantic R. R. Co. (N. Car. 1904), 46 S. E. Rep. 159; Cunningham v. City of Thief River Falls (Minn. Sup. 1901), 86 N. W. Rep. 763; Noonan v. Consolidated Traction Co., 64 N. J. L., 46 Atl. Rep. 770; City of Leavenworth v. Hatch, 57 Kan. 57; Shearer v. Town of Buckley, 31 Wash. 370; Brannen v. Kokomo, etc., Gravel Road Co., 115 Ind. 115, 7 Am. St. Rep. 411.

[25] Ouverson v. City of Grafton, 5 N. Dak. 381.

[26] Dean v. Penn., etc., R. R. Co., *supra*; Fechley v. Springfield Traction Co. (Mo. App.), 96 S. W. Rep. 421; Holden v. Mo. Pac. Ry. Co., 177 Mo. 456; Allyn v. Boston & A. R. R. Co., 105 Mass. 77, 59 Cent. L. J. 431; Bush v. U. P. R. R. Co., 62 Kan. 709, 64 Pac. Rep. 624. In this case the plaintiff a girl, 17 years old, was injured by the buggy in which she was riding by invitation, being run into by a train at a railroad crossing. The buggy had been driven along a road parallel with, and in full view of, the track for a long distance, and as it was turned to cross the railroad track, just as it got on the track was struck by engine; the girl was the first one to see the train. The court held that she was not depending on her escort but was depending on herself.

[27] Carlisle v. Sheldon, 38 Vt. 440.

[28] Yahn v. City of Ottumwa, 60 Iowa, 429.

[29] Iowa Sup. Ct. 1901, 88 N. W. Rep. 379. In this case while the husband was walking with his wife, he stepped on a loose board in the sidewalk causing it to fly up and strike her. It was held that even if the husband was negligent, she would not thereby be barred from an action against the

the doctrine of that case was repudiated. The rule of the Missouri courts is that there is no imputation of negligence in such cases.[30] The general rule is that the husband's contributory negligence is not imputed to the wife, simply because he is driving her[31] and not shown to have been acting as her agent.[32]

Where two or more persons are engaged in a common enterprise, each one is the agent of all the others, and if any one of them is injured by the negligence of a third party the negligence of any others contributing to the injury will be imputed to and bar a recovery against the tort feasor by the one injured; thus, where two men were engaged in moving furniture with a wagon, and the one not driving was injured by the negligence of a third person, the contributing negligence of the driver was imputed to him.[33] In a case where two mechanics were riding in a wagon, which they were jointly using for the moving of their tools, the contributory negligence of the driver was imputed to the other, injured by negligence of a railroad company;[34] and where two persons in a boat were run down by a steamer, the contributory negligence of the one rowing was held to be imputed to the other.[35] In a case where two car inspectors were working together, and one of them was injured while at work under a car, by another car being run against it, the other inspector being in a position to see the approach of danger and supposedly watching for it, it was held that if there was an agreement between them that one should watch for cars while the other worked, the negligence of the one on watch would be imputed to the other, but where no such agreement was shown there would be no such imputation.[36] In another case, two men driving in a buggy at night were nearing a railway crossing, when the driver agreed to let a friend of his ride and sent him forward to ascertain if there was a train approaching the crossing, and upon being signaled by him to come on, drove upon the crossing, when the buggy was struck by a train and the man not driving killed. It was held that the negligence of the lookout was to be imputed to deceased.[37] But where a young lady, one of the members of a picnic party, composed of young people of both sexes, the men of which hired the omnibus in which the party rode, and the driver (the ladies having nothing to do with either), was injured by the negligence of a third, it was held that she was not engaged in a common enterprise with the men of the party and that neither their negligence nor that of the driver could be imputed to her.[38] The contributory negligence of the driver of an ice wagon is not imputed to a boy riding with him helping to deliver ice.[39] The contributory negligence of the driver of a vehicle is not to be imputed to one riding with him, simply because the relation of partnership exists between them, but would be imputed if they were at the time upon partnership business;[40] and the negligence of the driver of a fire truck upon which a fireman, killed by the negligence of street car company was riding to a fire, was held not to be imputed to the deceased.[41] It has been held that the negligence of the master may be imputed to his servant and bar a recovery against a person guilty of negligence and who would otherwise be liable in damages,[42] but the trend of the modern decisions is opposed to the doctrine of those cases.[43] On the

[30] Flori v. City of St. Louis, 3 Mo. App. 231.

[31] Miller v. Louisville, etc., Ry. Co., 128 Ind. 97, 25 Am. St. Rep. 416; Indianapolis St. Ry. Co. v. Johnson (Ind. 1905), 72 N. E. Rep. 571, 60 Cent. L. J. 239; Reading Township v. Telfer, 57 Kan. 198; Lake Shore, etc., Ry. Co. v. McIntosh, 140 Ind. 261, 38 N. E. Rep. 476; Finley v. Ry. Co., 71 Minn. 471; Lammers v. Great Northern Ry. Co. (Minn. Sup. 1901). 84 N. E. Rep. 724. But it was held in this case that if the wife failed to look and listen for trains at a railroad crossing, according to her opportunities, she was herself guilty of such contributory negligence as would prevent her recovering damages.

[32] Hedges v. City of Kansas, 18 Mo. App. 62; Munger v. City of Sedalia, 66 Mo. App. 629. The question was raised but not decided in Hicks v. Citizens Ry. Co., 124 Mo. 115.

[33] Schron v. Staten Island Elect. Ry. Co., 45 N. Y. Supp. 124.

[34] Omaha & R. V. R. R. Co. v. Talbot, 48 Neb. 627.

[35] Yarnold v. Bowers (Mass. 1904), 71 N. E. Rep. 799, 59 Cent. L. J. 431.

[36] Abbitt v. Lake Erie & W. Ry. Co. (Ind. Sup. 1898), 50 N. E. Rep. 729.

[37] Bronson v. N. Y. Cent. & H. R. R. Co., 49 N. Y. Supp. 257, 24 App. Div. 262.

[38] Koplitz v. City of St. Paul (Minn. 1903), 90 N. W. Rep. 794.

[39] Baxter v. St. Louis Transit Co., 103 Mo. App. 597. The court saying: "The contributory negligence of one over whom plaintiff has no control is not to be imputed to him."

[40] Holmark v. Consolidated Traction Co., 60 Cent L. J. 457.

[41] Geary v. Met. St. Ry. Co., 82 N. Y. Supp. 1016.

[42] Child v. Hearn, L. R. 9 Exchg. 176; Lake Shore & Mich. R. R. Co. v. Miller, 25 Mich. 274.

[43] Hydes Ferry Turnpike Co. v. Yates, *supra*; Phillips v. Heraty (Mich. 1904), 97 N. W. Rep. 963.

other hand when the negligence of plaintiff's servant contributes to an injury caused by the negligence of another, it will be imputed to the master; thus it was held where plaintiff's hired man was driving his wagon, in which both were riding, that the negligence of the servant would bar a recovery by the master against a railroad for injuries by being run into by a train on the crossing.[44] The keeper of a childrens' school owned and operated a bus in connection with it to take the children to and from school, hiring the horse and driver from a livery stable for so much per month. While driving in the bus for the above purpose, she was injured by a collision of a train with it at a railroad crossing. It was held that the driver was her servant and his contributory negligence to be imputed to her.[45] In the case of Koslovki v. International Heater Co.,[46] the plaintiff had contracted with a manufacturer to clean moldings at so much per 100 weight, the manufacturer to furnish the machine used for that purpose and keep it in repair. An employee of the plaintiff had immediate charge of the machine and knew that a part of it would come loose every day and need fixing. Plaintiff was injured by a piece of the machine becoming loose and falling on him. It was held that he was not barred from recovering against the manufacturer by this knowledge on the part of his own employee. It has been held that if the gripman on a cable car is under the control of the conductor and subject to his orders, the negligence of the gripman contributing to an accident caused by the negligence of the employee of another road will be imputed to the conductor so as to bar him from recovery against the other road.[47] In a case where the conductor on a freight train, riding at the time in the caboose, was killed in a collision, caused by the negligence of persons in charge of another train, it was held that the contributory negligence of the engineer of his own train was not to be imputed to him; that the engineer was chosen by the railroad company for his fitness for the position; that the conductor did not have to keep him under his constant supervision. The court says: "The contributory negligence of one person cannot be imputed to another unless such person is under his control and the negligence takes place at a time when it was in his power to prevent it, and under circumstances which indicate that he acquiesced in the wrong.[48] In a case where the plaintiff had leased the fourth floor of a building for an overall factory, with the privilege of using the elevator, which the owner agreed to keep in repair. This elevator was used by all the tenants in the building and was run by whoever was using it at the time. An employee of plaintiff was injured by a defect in the elevator, sued him and recovered a judgment for damages. In an action by the plaintiff against his lessor to recover the amount he had been mulcted in the action of the employee, it was held that he was not barred by the fact that his manager knew of a defect in the elevator before the accident, as this defect alone would not have caused the accident.[49] In the case of Harrison v. Kansas City Electric Light Co.,[50] recently decided by the Supreme Court of Missouri, an action by the widow for the death of her husband from an electric shock due to the negligence of the defendant, it was held that though the accident would not have happened except for the negligence of the 14-year-old son of deceased in diverting the electric current and forming what was called a "ground" and "short circuit," a recovery against the electric company was not barred. The court considers at some length the question of concurrent negligence, but does not mention the term "imputed negligence," and in this connection only says: "And it makes no difference in this case that the boy was the son of deceased. The legal consequence is the same as if it had been done by an entire stranger to deceased.

JOHN T. MARSHALL.
Kansas City, Mo.

[44] Smith v. Cent. & H. R. R. Co., 38 N. Y. Supp. 66, 4 App. Div. 493. See also Read v. City Sub. Ry. Co., 115 Ga. 366.

[45] Reed v. Met. St. Ry. Co., 68 N. Y. Supp. 539, 58 App. Div. 87.

[46] 77 N. Y. Supp. 794, 75 App. Div. 60.

[47] Bailey v. Citizens St. Ry. Co., 152 Mo. 449.

[48] St. Louis & S. F. R. R. Co. v. McFall (Ark. 1905), 86 S. W. Rep. 824.

[49] Olson v. Scultz (Minn. Sup. Ct. 1897), 70 N. W Rep. 779.

[50] 93 S. W. Rep. 951.

WHETHER OR NOT A CONTROVERSY IS SEPARABLE WITHIN THE MEANING OF THE REMOVAL ACT, IS TO BE DETERMINED BY THE INTENT OF THE STATE LEGISLATURE WITH RESPECT TO THE FORM OF PROCEDURE.

THE CITY OF KANSAS CITY v. HENNEGEN.

United States Circuit Court, Western District of Missouri, April 13, 1907.

Where by statute a state provides a procedure in condemnation proceedings whereby the whole action is to be treated as one and to be tried by one jury, no matter how many parties may be interested, and that there shall be but one judgment, in such case although the interests of different defendants may be separate, yet the suit is an indivisible unit, incapable of separation into parts, and therefore not removable as to any of the parties from the state court to a federal court.

PHILIPS, D. J.: Kansas City, desiring to extend what is known as its general market square for the purposes of a public market, its board of aldermen, by ordinance approved by the mayor thereof in conformity with the provisions of its charter, designated a large quantity of land to be condemned for such use. This area embraced perhaps a block or more of ground, laid off into lots, with buildings thereon, owned in severalty by a large number of persons. The ordinance also, as in such case provided in the charter, designated what is known as a "benefit district," to be assessed, in connection with the city itself, to raise the necessary means for paying for the private property to be taken and appropriated for such use. This benefit district embraces say eight or ten blocks of ground. The property within this large benefit district, as is usual, is owned separately by a vast number of persons. After the preliminary inquest before the mayor, as provided under the charter, an appeal was taken from the findings of the jury to the circuit court of Jackson County. A given portion of the real estate to be taken and appropriated by the city belonged to Richard H. Hennegen and Richard B. Hall, said Hennegen owning a life estate therein, and the said Hall the estate in remainder. Hennegen and Hall being nonresident citizens of the state, in due time and form, filed their petition in the state circuit court for a removal of the case into this court, which was accordingly done. Kansas City has filed a motion to remand this cause, on the ground that the removing defendants did not have such a separable interest in the controversy as to entitle them to remove the whole cause into this jurisdiction. This motion has been heard and submitted.

The provisions of the charter of Kansas City in respect of condemnation proceedings are practically the same as stated in the Pacific Railroad Removal Cases, reported in 115 U. S. 3, 20, 21, 22. That a proceeding instituted by a corporation or municipality to condemn private property to its public use so far partakes of the character of a suit at law as to render it removable from the state court into the proper federal court, where the conditions exist authorizing a removal as prescribed by the Removal Act of Congress, is no longer an open question in this jurisdiction. Union Terminal Railway Company v. C. B. & Q. R. Co., 119 Fed. Rep. 209; South Dakota Central Railway Company v. C. M. & St. P. Ry. Co., 141 Fed. Rep. 578; Traction Company v. Mining Company, 196 U. S. 240. Most of the questions raised and discussed by counsel for Kansas City on the motion to remand were considered and ruled upon in the Pacific Railroad Removal Cases, 115 U. S. *supra*. That was a condemnation proceeding instituted by Kansas City under the same charter, in effect, as that here involved, to condemn to the city's use lands for the opening of Twelfth street in said city, extending through a large quantity of land belonging to separate owners. The decision in that case answers the suggestion of counsel for the city that the cases where it has been ruled that the nonresident citizen seeking the removal of the cause from the state to the federal court present the instance where the petitioner for removal was the sole defendant, and that the right of such nonresident property owner to remove the cause should be limited accordingly. The record in said Pacific Railroad Removal Cases, on file in the office of the clerk of this court, which is before me, shows that it was a proceeding by the city to condemn property, to the use of said street, owned in severalty by a great number of individuals and corporations, under an ordinance establishing a large benefit district wherein a vast number of persons owned in severalty tracts of land to be assessed for benefits to pay the damages for property taken. The Union Pacific Railroad Company owned a certain tract of land, part of which was sought to be condemned and appropriated absolutely for this street, and a part was within the benefit district designated to be assessed by way of benefits. A large body of defendants were citizens of the State of Missouri; yet the Union Pacific Railroad Company, as a nonresident corporation, was held to be entitled to remove the proceeding, on the ground that the controversy was wholly separable as between it and the city.

The case of Hennegan and Hall, the removing defendants in the case at bar, is stronger in favor of their right. The Union Pacific Railroad Company, in the removal cases, was concerned not only as to that portion of its land sought to be appropriated by the city, but also as to the portion within the district to be assessed for benefits. In the latter respect it was more or less indirectly interested with all the other similarly situated co-defendants in the benefit district. Whereas, the whole property involved of Hennegen and Hall is sought to be taken. This being so, according to the opinion of Mr. Justice Bradley in said Removal Cases, the matter in which they are concerned is as to the amount of damages to be found in their favor, representing the value of

their property; which being separable from the other issues in the case, was, therefore, removable under the Judiciary Act. The defendants here raise no question of jurisdiction as to the right of the city to condemn this property. Whether or not any other person's land is to be taken, and the value thereof, Mr. Justice Bradley said, did not concern the removing defendant, as by express provision of the charter "each piece of property taken is valued by itself without reference to the proposed improvement.' and the amount of benefit to each piece of property benefited is ascertained separately without reference to the other pieces benefited." And, therefore, he held that "this controversy involving these issues, is a distinct controversy between the company and the city. It may be settled in the same trial with the other appeals, and by a single jury; but the controversy is a distinct and separate one, and is capable of being tried distinctly and separately from the others."

The doubt cast upon the decisiveness of that ruling in this case arises on the following statement in the opinion of Mr. Justice Bradley: "We have not been furnished by the counsel on either side with reference to any decisions of the Missouri courts giving construction to this section. Whether the direction that the cause shall be tried *de novo* requires that all the valuations and assessments are to be retried, or only those affecting the appellants, is not expressly stated." That opinion was filed in May, 1885. At the October Term, 1884, of the Supreme Court of Missouri, the case of State v. Gill, 84 Mo. 248 was heard. When the opinion was filed does not appear; but from the condition of the docket of that court, known to the writer of this opinion then connected with that court, and the date of the publication of Volume 84 of the reports, it is altogether probable that this opinion had not been announced when Mr. Justice Bradley prepared the opinion in the Pacific Railroad Removal Cases.

The construction of section 3 of said charter was directly involved in the case before the Supreme Court of Missouri. The substantive effect of that construction was that the condemnation proceeding against the various defendants presented the case of an indivisible unit, to be tried to one and the same jury, unless trial by jury be waived, and the jury must pass upon and make awards as to the amount of damages for each and every separate piece of land taken or damaged, and determine the benefits to be assessed against each piece of property within the benefit district. The whole finding must be embraced in one judgment. So much so is the judgment a unit, it was held not only that in the event of an appeal by a single defendant from the award in the mayor's court the whole case, including each separate piece of property involved, must be gone over and tried *de novo*; but also that if any error be committed in the progress of the trial in the circuit court prejudicial to the interests of any one of the various defendants suing out a writ of error, for which the judgment should be reversed, the reversal operates as a vacation of the entire judgment, necessitating, on remand, a trial *de novo* of the whole case from beginning to end, both as to the reascertainment of the amount of damages sustained by each owner whose property is taken or damaged, and the reascertainment and readjustment of the benefits to be assessed against each tract or parcel of land within the benefit district.

The writ of error in that case was sued out by only a small per cent of the defendants who were interested only in the amount of benefits assessed against their property. The only error committed by the trial court was in an instruction given to the jury, authorizing them to predicate their judgment alone upon their personal view of the property, regardless of the other evidence in the case touching the same, under which instruction the finding of the jury, both as to the value of the property taken and the amount of benefits assessed, might have been erroneously influenced. It must be confessed that the broad terms of the opinion in that case could well operate as an oppressive injustice in the instance of a co-defendant whose separate property is sought to be condemned. The only question involved between him, the city and others, is the value of his property sought to be taken or condemned; that is to be tried out as a single issue between them. His lawyer tries his case cleanly and faultlessly; the court commits no errors in its rulings or instructions to the jury on the issues; he and the city acquiesce in the findings of the jury, neither asking for a review thereof: but as to some question or matter respecting the trial of another condemnee, or assessee for benefits, error is comitted, and either the city or the party immediately concerned sues ont a writ of error. For that error the cause is reversed. Why should there be a trial *de novo* of the issue between the city and the owner whose property has been correctly valued in the first trial, in which issue no error was committed? He is not concerned in the valuation of any other defendant's property, or in the assessment to be made upon the property in the asssessed district. The assessments upon the benefitted district are only a means by which the city raises the necessary money to pay for the property taken. Until the property owner is paid the value of his property so found, the city under its charter cannot take possession of the property. All concerned have had their day in court on the trial of this cause. What becomes of the maxim that no person shall be twice vexed in a suit concerning the same cause? How inexpressibly hard and oppressive is it on him that he should be again burdened with the expenses of a rehearing by re-employing a lawyer, and attending perhaps with his witnesses through another tedious hearing, which, as the history of such inquest shows, may drag its weary length through weeks and months, and then again be

exposed to a repetitious error of the court, to a reversal, and a trial *de novo, ad infinitum*. It would seem that as to a defendant so situated, the court should give such practical, sensible construction to the statute as to avoid such absurdity and gross injustice. The result of an error should never be visited upon the unoffending suitor.

The evident thought in the mind of Mr. Justice Bradley, in his opinion in the Removal Cases, was that after the amount of damages found to be paid, the matter of assessment *pro rata* against the benefitted property would be a matter of "mathematical calculation." With this view in his mind, he suggested that where the single issue of value of property was involved between the separate owner and the city, that if the state court "had equity powers, it might direct a separate issue for the trial of this controversy by itself. It might try the other appeals without a jury (the parties waiving a jury), and try this controversy by a jury." It must now be conceded that in such condemnation proceeding neither the state court nor this court can exercise equity powers, and so divide the method of assessment under this charter, for the palpable reason that it is a suit at law, triable as an entirety, to one and the same jury, or to the court if all the parties waive a jury. And each party to be assessed for benefits is interested and concerned in seeing that as little damages as possible are assessed for the property to be taken; for in the proportion of the diminution of the fund to be paid are the burdens of the subjects of assessment for benefits lessened.

The ruling in State v. Gill, has not been overruled by the supreme court, as far as I am advised. The attention of the court has been directed by counsel for the removing defendants to the case of Kansas City v. Block, 175 Mo. 433, 443, wherein Judge Fox was discussing the question raised by those defendants who alone had sued out a writ of error to have reviewed the judgment of the circuit court in the condemnation proceedings instituted by Kansas City. They raised the question that some of the parties named in the proceeding had not been duly notified, and had not appeared in the case below. It was of this contention that Judge Fox said: "It is insisted that the judgment in this proceeding is erroneous because of the want of service of process upon some of the other parties in interest, and the insufficiency of the notice by publication. It is sufficient to say as to this contention, that the parties who appellant claims are injured by this proceeding, are not before the court. We will heed their grievances when our attention is directed to them in an appropriate proceeding for that purpose. This judgment is not an entirety, the interests of the parties are independent of each other; the property damaged or benefited is not located at the same place."

We may aptly apply to the foregoing language the sensible observation of Chief Justice Marshall, in his final summing up in the trial of Aaron Burr: "Every opinion, to be correctly understood, ought to be considered with the view to the case in which it was delivered. * * * General expressions ought not to be considered as overruling settled principles without a direct declaration to that effect."

As the parties not appealing in the case considered by Judge Fox were not complaining of the judgment against them for the lack of sufficient notice, the cause was not to be reversed by the appellants for any error which did not prejudice them. In that sense the interests of the parties concerned in the error being separate, Judge Fox said that the judgment was not an entirety. The ruling in the State-Gill case was not involved, and evidently was not in the mind of the learned judge. Without any direct reference to the State-Gill case it would be strained for this court to infer that it was the mind of the supeme court to overturn the deliberate ruling in that case. In the recent case of Cincinnati, N. C. & T. P. Ry. Co. v. Bohon, 200 U. S. 221, Mr. Justice Day, in discussing the question of the removability of a suit against a nonresident railroad company where it was joined with its servant as co-defendant, under a statute of Kentucky which authorized such joint action, said: "A state has an unquestionable right by its constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff in due course of law and good faith has filed a petition electing to sue for a joint recovery given by the laws of the state, we know of nothing in the federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a nonresident defendant therein properly joined in the action under the constitution and laws of the state wherein it is conducting its operations and is duly served with process." In the case at bar, under the scheme of the charter of Kansas City, by legislative grant the state has seen fit according to the ruling of the Supreme Court of the State, to require in condemnation proceedings by the city that it shall in one suit join all persons as defendants whose property interests are to be affected thereby, whether as owners of parcels of land to be taken and appropriated to the use of the city, or as owners in the designated benefit district to be burdened with assessments to pay for the property so appropriated; that the whole case shall be tried by one jury, unless waived: and that there shall be but one judgment. The Supreme Court of the State has construed this charter to mean that although the estates and interests of the different defendants may be separate, yet the suit is an indivisible unit with absolute interdependence between all the defendants, incapable of separation into parts so that one may be unaffected by the findings and judgment as it concerns another. The wisdom, justice, or sound

policy of this legislation this court cannot revise or correct, as it is within the competency of the legislature to direct how the sovereign power of eminent domain shall be exercised by the city, and the manner of procedure therein. If the method adopted be harsh and oppressive in the particular as noted in this opinion, it is for the legislature to correct the abuse, or for the Supreme Court of the State to so tone down by reasonable construction in a revised opinion when confronted with such question, the apparent ruling in the State-Gill case, as not to produce the absurd and harsh result indicated.

Since the decision of the supreme court was published in the State-Gill case there has been no attempted removal of such condemnation proceedings instituted under the charter of Kansas City by a single nonresident, to my knowledge, save that of Kansas City v. C. M. & St. P. Ry. Co. for the extension of Wyandotte street in 1894. There was a motion by the city to remand the cause. The record entry in that case is as follows: "Motion to Remand." "This cause having been heretofore submitted to the court, and now the court being fully advised in the premises, doth order that the same be sustained, and that this cause be remanded to the Circuit Court of Jackson County." No opinion was filed by the court, and I am unable to recall whether or not it was a consent order or an expression of the view of the opinion then entertained by the presiding judge. Yielding to what I conceive to be the effect of the construction placed on this charter by the state court, the motion to remand must be sustained.

NOTE.—*Did the Laws of Congress Intend to Authorize a Non-resident Party Defendant to Remove His Cause to the Federal Court When That Cause in its Nature is Capable of Separate Consideration and Adjudication.*—The above decision rests upon the assumption that, in determining whether or not a "controversy" is "separable," within the meaning of the Removal Act, the inquiry must be—what was the intent of the state legislature with respect to the form of the proceeding? Did the state law, under which the proceeding is conducted, contemplate that the state courts should be forbidden to try the "controversy" in question except in the same proceeding in which are adjudicated the rights of all the landowners affected? To us this assumption seems not warranted by reason nor supported by authority. The question is, not whether the state laws mean the proceedings to be inseparable in form, but whether the laws of congress intend to authorize a non-resident party defendant to remove his cause to a federal court when that cause in its nature, its substance, is capable of separate consideration and adjudication. In many cases the states have legislated with the deliberate, if unavowed, purpose to prevent the removal of causes, but always without avail when the question has come for adjudication before the federal courts. Mississippi Mills v. Cohn, 150 U. S. 202; Southern Pacific Ry. v. Denton, 146 *Id.* 202; Cowley v. Northern Pac. Ry., 159 *Id.* 569, Arroworth v. Gleason, 129 *Id.* 86. The intent of the state legislature as to the procedure and the forum cannot determine the act of congress as to a substantive right of a non-resident citizen. The Removal Act deliberately distinguishes between the whole "suit" or proceeding and a "controversy" arising in and a part of such "suit." If the requisite diversity of citizenship exists between the parties to such "controversy," it matters not that, owing to the state law regulating the procedure, such "controversy" must be conducted as a part of such "suit."

The existing act of congress, in fact, contemplates that the "controversy" shall not be torn from the "suit" and adjudicated as a separate cause of itself, but that the whole "suit" shall be removed for adjudication. The only effect of the decision in State v. Gill, 84 Mo. 248, is that a "suit" for condemning property under the Kansas City charter cannot be divided into separate suits that can be separately prosecuted to different final judgments; that an appeal by one landowner suspends the entire "suit," and a reversal of a judgment as to one reverses as to all. But it does not follow that a "controversy" between the city and a defendant whose property is taken or destroyed is, in its substance, inseparable from the other "controversies" existing between the city and other defendants owning distinct parcels. For instance, in the case at bar, Hennegan and Hall were interested solely in establishing the value of their own property. That value, however great or small, the city was legally bound to pay to them. This value in no way depended upon the value of any other parcel involved, nor did it depend upon the amount which any or all of the parties "benefitted" might have to pay for such "benefits." Hennegan and Hall had absolutely no "controversy" with any other property owner. Just as soon as the jury reached a conclusion as to the value of their property, they were, for all practical purposes, out of the case. Therefore the "controversies" as to the values of other parcels taken, and as to the relative portions of the total cost of the improvement to be assessed against the parties "benefitted" in no way concerned them. Whatever the state law may have contemplated in such case, is it not plain that such a "controversy" is "separable" within the meaning of the acts of congress? Under the Kansas City charter, the same jury ascertains both the amounts to be paid to those whose property is taken and the amounts to be assessed against those whose property is not taken, but "benefitted." But these are two "separable" "controversies," though both included in one "suit." The taking of property is effected under the power of eminent domain. The assessment is made under the taxing power. These powers are distinct in their source or origin and in their nature. Garrett v. St. Louis, 25 Mo. 505; Keith v. Bingham, 100 Mo. 300.

It seems to us that Judge Philips has misread the words of Justice Bradley in the removal cases, 115 U. S. 1. When Justice Bradley held that the "controversy" in 115 U. S. was "a distinct controversy between the company (landowner) and the city," he did so notwithstanding he conceded that "it may be settled in the same trial with the other appeals and by a single jury." What he sought to show was—not that this state court could lawfully give a separate trial, but that the controversy was "capable of being tried distinctly and separately from the others," that is, that in its substance, its nature, it was "separable" within the meaning of the act of congress. When Justice Bradley, by way of illustration, urged that "if the state circuit court had equity powers, it might direct a separate issue," etc., he did not mean that, in his view, this charter actually conferred any such power upon

the state court. Indeed, the very form of his statement—"if the court had" such powers—shows his understanding that it had no such power in this particular proceeding. His conclusion as to the "separable" nature of the "controversy" did not rest upon any such interpretation of the charter. We think Judge Phillips allows far too much weight to Justice Bradley's remark "whether the direction (in the charter) that the cause shall be tried *de novo* (on appeal from the mayor's jury to the circuit court) requires that all the valuations and assessments are to be retried, or only those affecting the appellants, is not expressly stated." When Justice Bradley spoke, the Removal Act of 1875 was in force, which provided for the removal of the "separable controversy" alone, while the rest of the "suit" remained in the state court for adjudication. In such a situation, it might well be material to inquire whether the proceeding admitted of such a splitting up of the cause of action. But under the existing Removal Act, the whole "suit" is removed along with the "controversy," and no splitting up of the cause is either necessary or proper. In this way the federal court becomes vested with power to dispose of the entire "suit," no matter "whether all the valuations and assessments are to be retried, or only those affecting" the applicants for removal. Of the "separable" nature of the "controversy," we think Judge Philips has himself given excellent illustration in his criticism of the decision in State v. Gill, 84 Mo. 248.

JETSAM AND FLOTSAM.

ASSIGNABILITY OF WAGE CLAIMS IN BANKRUPTCY.

The Supreme Court of the United States has at length settled the question heretofore in doubt by reason of the decisions of inferior courts, as to whether the assignment of a wage claim, before the bankruptcy of the employer, deprived it of its character as a preferred claim. Shropshire, etc., Co. v. Bush, 27 Sup. Ct. Rep. 178.

The court holds that it does not, and it is difficult to see how any other view could be taken of the meaning of the statute, but the contrary has been held in at least one case. *In re* Westmoreland, 99 Fed. Rep. 399. The preference rests upon obvious grounds of public policy, and to whittle it away by compelling the needy wage earner to wait upon the tedious administration of the bankrupt's estate, or forfeit his preference, is to stick in the bark of the statute. The decision is in the right direction and gives an interpretation in consonance with the spirit and intent of of the act.—*National Corporation Reporter.*

BOOK REVIEWS.

SHERWOOD'S COMMENTARIES ON CRIMINAL LAW.

Commentaries on the Criminal Law of Missouri by Thomas A. Sherwood will need no encomiums to assure the Missouri bar of its value, and will no doubt at once find a place in nearly every law office in the state, and certainly in the office of every lawyer who practices criminal law. Judge Sherwood's long experience in the criminal branch of the Supreme Court of Missouri, fits him in a particular manner to do justice to such a work. Judge Sherwood has a remarkably fine legal mind and has written many very fine opinions upon many questions of law outside the criminal law. Some of these will compare favorably with those which made Lord Mansfield famous. It is said that nearly fifty of Judge Sherwood's dissenting opinions, while on the bench (thirty years), were finally accepted as the law. But it would be a record passing human experience if during that length of time he had not made some blunders. He frankly admits this and in this work endeavors to correct them. He says in his introduction: "Of most of the chief leading cases found in the reports of our courts of last resort, and sometimes in subsidiary courts, analyses have been prepared showing the dominant as well as salient points ruled therein, with, in some instances, words of praise more or less pronounced where praise was thought deserved (though not in all), and with words of disapprobation where disapprobation seemed to be demanded. This course of analysis resulting in terms of disapproval has been pursued with endeavored impartiality even in instances where the undersigned has written the prevailing opinion. Among other instances, saying nothing of lesser errors, occurs State v. Owen, 78 Mo. 367, where the plea in bar *autrefois acquit*, should have proved successful, the judgment reversed, the defendant discharged, and flagrant error occurred in ruling otherwise, for which profound though unavailing regret is here expressed, and will continue to be felt." The man who has not made some mistakes, according to his own notion, is not to be trusted. The man who frankly confesses that he has made mistakes and is endeavoring to correct such errors as the opportunity offers may be trusted. The actions are all set forth in clear and incisive language which has characterized Judge Sherwood's opinions. He has gathered the big cases of England and America to support his propositions and it is readily to be seen from the citation of cases that this work is not only a good thing for Missouri lawyers but also for any lawyer in any state to have on his shelf. We take particular pleasure in commending this work to the profession and feel satisfied that it conserves the deep, rich learning of the full maturity of mind of one of the ablest of the Missouri judges. May it bring into the twilight of his declining years a comfort and a joy, is the wish of the CENTRAL LAW JOURNAL.

It is published by the Pipes-Reed Book Company, of Kansas City, Mo., and is contained in 1008 pages.

BOOKS RECEIVED.

A Treatise on the Law and Proceedings in Bankruptcy. By Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit. Author of "Forms of Federal Practice." Third Edition. Cincinnati. The W. H. Anderson Co. 1907. Buckram. Price $6.30. Review will follow.

HUMOR OF THE LAW.

A well known judge on a Virginia circuit was reminded very forcibly, the other day, of his increasing baldness.

One of his rural friends, looking at him rather hard, drawled. "It won't be so very long, jedge, fo' you'll hev to tie a string round your head to tell how fer up to wash yer face.—*Green Bag.*

"What a murderous looking individual the prisoner is!" whispered an old lady in a crowded court room. "I'd be afraid to get near him."

"Sh!" warned her husband. "That ain't the prisoner. He ain't been brought in yet."

"It ain't! Who is it, then?"

"It's the judge."—*Lippincott's.*

In a Tennessee court, an old colored woman was put on the witness stand to tell what she knew about the annihilation of a hog by a railway locomotive.

Being sworn, she was asked if she had seen the train kill the hog in question.

"Yassah, I seed it."

"Then," said counsel, "tell the court in as few words as possible just how it occurred."

"Yo' honah," responded the old lady, "I shore kin tell yo' in a few words. It jes' tooted an' tuck him."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCORD AND SATISFACTION—Part Payment.—In an action where defendants claimed an accord and satisfaction, evidence held to justify a finding that an acceptance of a check was not regarded as an accord and satisfaction by either party.—Beattie Mfg. Co. v. Heinz, Mo., 97 S. W. Rep. 188.

2. APPEAL AND ERROR—Direction of Verdict.—An assignment that the court erred in denying defendant's motion to direct a verdict cannot be sustained unless there is no evidence tending to support the plaintiff's cause of action.—Star Brewery Co. v. Houck, Ill., 78 N. E. Rep. 827.

3. APPEAL AND ERROR — Parties. — Where plaintiff sought to enforce judgments against P on land occupied by him, the legal title to which was in his father, P held not a necessary party to an appeal taken by the father from an adverse decree.—Oliver v. Perry, Iowa, 109 N. W. Rep. 183.

4. APPEAL AND ERROR—Ruling on Evidence.—In an action on an indemnity policy, the statement by the court that this is not an action on the policy though technically incorrect, was not ground for reversal where the court defined the issue to be whether or not defendant was estopped by its conduct from denying its liability.—Tozer v. Ocean Accident & Guarantee Corp., Minn., 109 N. W. Rep. 410.

5. APPEAL AND ERROR — Rulings and Pleadings.—Where the same issues were raised by second amendment to an answer, which were presented by a first amendment stricken on motion, any error was without prejudice.—Murphy v. Hiltibridle, Iowa, 109 N. W. Rep. 471.

6. BAILMENT—Rights of Bailee.—The bailee of a finder after having ascertained the finder's intention to convert the article to his own use held bound to retain the article until the true owner was ascertained.—Lavelle v. Belliu, Mo., 97 S. W. Rep. 200.

7. BANKS AND BANKING—Liability of Directors.—The directors of a dissolved banking corporation are not personally responsible for loss of the bank by the negligence of the disbursing officers in paying unauthorized checks.—Daugherty v. Poundstone, Mo., 96 S. W. Rep. 728.

8. BANKS AND BANKING—Life Policy.—A director and trustee of a bank, which, during its existence, held a life policy as security for a debt, held entitled to the amount of the policy on the insured's death, as trustee for the shareholders.—New York Life Ins. Co. v. Kansas City Nat. Bank, Mo., 97 S. W. Rep. 195.

9. BANKS AND BANKING—Right to Rely on Indorsements.—A bank paying a check has a right to rely on the indorsements thereon, where one transmitting it to the bank for payment guaranties the indorsement and the bank supposes that the check is going through the regular course.—Greenwald v. Ford, S. Dak., 109 N. W. Rep. 516.

10. BENEFICIAL ASSOCIATIONS—Failure to Pay Dues.—A member of a beneficial association failing to pay dues as provided by the by laws held suspended without action on the part of the association.—Beeman v. Supreme Lodge, Shield of Honor, Pa., 65 Atl. Rep. 792.

11. BILLS AND NOTES—Who Are Indorsees in Due Course.—A principal receiving from his agent an order for a threshing outfit and a note as collateral, held not an indorsee of the note in due course.—New Birdsall Co. v. Stordalen, S. Dak., 109 N. W. Rep. 516.

12. BOUNDARIES — Description.—The beginning point of a description in a deed held the intersection of the south and east lines of certain streets at the corner of a lot, and not the intersection of the center lines of such streets.—Wegge v. Madler, Wis., 109 N. W. Rep. 228.

13. BROKERS—Commissions.—To entitle a real estate broker to his commission he must prove a sale which would entitle him to a commission under the provisions of a written contract with the owner of the land under Cobbey's Ann. St. 1903, § 10,258.—Tracy v. Dean, Neb., 109N. W. Rep. 505.

14. BUILDING AND LOAN ASSOCIATIONS—Insolvency.—On the insolvency of a building and loan association held, that the common stockholders were entitled to priority of payment over the holders of the founders' stock.—Watkins v. Commonwealth Savings & Loan Ass'n, N. J., 65 Atl. Rep. 751.

15. CARRIERS—Contract of Shipment.—Where a carrier receives freight consigned to a point beyond its line, it impliedly agrees to transport the goods to that place.—Wabash R. Co. v. Thomas, Ill., 78 N. E. Rep. 777.

16. CARRIERS—Injury to Shipment.—Where plaintiff shipped apples in bulk from New York to Minnesota in winter, the railroad company receiving the freight in Chicago was only required to exercise reasonable care to protect from frost.—Calender-Vanderhoof Co. v. Chicago, B. & Q. Ry. Co., Minn., 109 N. W. Rep. 402.

17. CARRIERS—Limiting Liability.—The contract of afreightment disclosing no consideration for the agreement limiting the carrier's liability for loss of the goods held that the agreement fails for lack of consideration.—Meyers v. Missouri K. & T. Ry. Co., Mo., 96 S. W. Rep. 737.

18. CERTIORARI—Discretion to Grant.—A writ of *certiorari* cannot be used to test the legality of the organization of a drainage district on technical grounds after the lapse of several months during which time it has been in operation, with the full knowledge of the petitioners

and where great public detriment would result.—Deslauries v. Soucie, Ill., 78 N. E. Rep. 799.

19. CHAMPERTY AND MAINTENANCE—Contingent Fees.—A contract for a contingent interest in the subject matter of litigation by way of compensation for professional services is valid and enforceable.—Taylor v. St. Louis Transit Co. Mo., 97 S. W. Rep. 153.

20. CHARITIES—Liability of Trustees.—The trustees of a home for indigent boys maintained as a charity held not liable for injuries to a servant.—Farrigan v. Pevear, Mass , 78 N.E. Rep. 855.

21. CONSTITUTIONAL LAW — Attorney's Liens.—Act Feb. 25, 1901, in relation to an attorney's lien on his client's cause of action, held not objectionable as destroying defendant's right to contract.—O'Connor v. St. Louis Transit Company, Mo., 97 S. W. Rep. 150.

22. CONSTITUTIONAL LAW—Revocation of Physician's License.—Laws 1905, p. 726, ch. 422, providing for the revocation of a physician's license for fraud held not an *ex post facto* law.—State v. Schaeffer, Wis., 109 N. W. Rep. 522.

23. CONTRACTS — Extra Compensation.—A contractor can recover for extra work and expense occasioned by an endeavor to follow erroneous plans, in accordance with which the building was to be constructed at a stipulated price.—Beattie Mfg. Co. v. Heinz, Mo., 97 S. W. Rep. 188.

24. CONTRACTS—Sufficiency of Performance.—One who had been granted permission by the tenants of a building to erect a bootblacking stand alongside the building held, on being forced to remove, not entitled to recover damages from the tenants.—Spelioponlos v. Schick, Wis., 109 N. W. Rep. 568.

25. CORPORATIONS—Embezzlement by Corporate Officers.—Where a treasurer and a director of a corporation caused money belonging to it to be paid on their own debt with knowledge of the facts, they were guilty of embezzlement under Pub. St. 1901, ch. 274, § 17.—State v. Davison, N. H., 65 Atl. Rep. 761.

26. CORPORATIONS — Forfeiture of Franchise.—That the entire stock of a bridge company is owned by a city is no ground for forfeiting its franchise.—Commonwealth v. Monongahela Bridge Co., Pa., 64 Atl. Rep. 909.

27. CORPORATIONS—Right of Stockholder to Sue.—An innocent stockholder of a corporation held entitled to sue in its behalf to recover losses by the fraudulent and *ultra vires* acts of certain directors without demanding that they direct suit by the corporation.—Hingston v. Montgomery, Mo., 97 S. W. Rep. 202.

28. CRIMINAL EVIDENCE—Photo of Prisoner in Prison Garb.—Where witness had been identified as having been incarcerated in a foreign penitentiary, it was improper for the state to offer a photograph of accused showing him dressed in prison stripes, etc.—State v. Moran, Iowa, 109 N. W. Rep. 187.

29. CRIMINAL LAW—Corporations.—Where a prohibited notice is printed in a newspaper published by a corporation and a complaint therefor is against individuals, they cannot be held responsible where there is no evidence that at the time of the offense they had any interest whatever, in such corporation.—State v. Bass, Me., 64 Atl. Rep. 884.

30. CRIMINAL TRIAL—Continuance.—Courts of general jurisdiction, having stated terms for criminal cases, for good cause, can place the indictment on file or continue the case to a subsequent term for sentence.—*Ex parte* St. Hilaire, Me., 64 Atl. Rep. 882.

31. CRIMINAL TRIAL — Intent.—On an issue as to defendants' intent in a criminal proceeding, evidence of facts bearing on their belief as to the effect of a written contract, held admissible though they tended to contradict its terms.—State v. Davison, N. H., 65 Atl. Rep. 761.

32. DAMAGES—Defective Sidewalks.—In an action for injuries to plaintiff by a defect in a city sidewalk, evidence that she had suffered falling of the womb since the accident, held admissible.—Hines v. Kansas City, Mo., 96 S. W. Rep. 672.

33. DAMAGES—Future Suffering.—An instruction in a personal injury action held too favorable to defendant as requiring absolute certainty of future suffering as a basis for damages therefor.—Huggard v. Glucose Sugar Refining Co , Iowa, 109 N. W. Rep. 475.

34 DAMAGES—Mental Suffering —Where a passenger suffered bodily injury as the result of the carrier's negligence, the passenger could recover for such mental suffering as was the natural and inevitable result of the injuries.—Chicago Consol. Traction Co. v. Schritter, Ill., 78 N. E. Rep. 820.

35. DEEDS—Execution.—A person may execute a deed by requesting another to sign his name thereto, or, when another has signed his name thereto without his request, by the acceptance of it as his own.—McAllen v. Raphael, Tex., 96 S. W. Rep. 760.

36. DEEDS — Reservations.— An exception in a deed withholds some part of the thing which would otherwise pass to the grantee, and differs from a reservation in that the latter creates a new right issuing out of the thing granted.—Spencer v. Wabash R. Co., Iowa, 109 N. W. Rep. 453.

37. DESCENT AND DISTRIBUTION — Advancements.—Where a deed was made to a wife by direction of her husband, he voluntarily having paid part of the purchase money, it is presumably an advancement or gift to the wife.—Nelson v. Nelson, Ky., 96 S. W. Rep. 794.

38. ESTOPPEL—Rights of Wrongdoers. —As between the original parties, an heir guilty of fraudulent representations inducing the widow to repudiate her husband's will, held not entitled to claim that the widow was estopped to move to set aside such election for fraud.—Whitesell v. Strickler, Ind., 78,N. E. Rep. 845.

39. EVIDENCE—Comparison of Handwriting.—The fact that a signature offered in evidence as a standard for comparison was made since the time of the signature in dispute held for the jury to consider as affecting the credibility thereof.— Greenwald v. Ford, S. Dak., 109 N. W. Rep. 516.

40. EVIDENCE—Expert Testimony.—In an action for death of plaintiff's intestate by being run over by a beer wagon, expert evidence held inadmissible to show that the team would have made such noise that if deceased had been standing still, he would have heard it.—Star Brewery Co. v. Houck, Ill., 78 N. E. Rep. 827.

41. EVIDENCE—Law of Other State.—A presumption that the laws of another state from which liquor, for the price of which suit was brought, was shipped were the same as those of Iowa would not be indulged where the effect would be to defeat plaintiff's recovery.—Samuel Westheimer & Sons v. Habinck, Iowa, 109 N. W. Rep. 189.

42. EVIDENCE—Pleading.—Where there are two suits between the same parties on different causes of action, the pleadings in the first suit are admissible as evidence in a second suit but are not conclusive.—Commonwealth v. Monongahela Bridge Co., Pa., 64 Atl. Rep. 909.

43. EVIDENCE—Testamentary Capacity.—The opinions of subscribing witnesses to a will as to testator's soundness of mind held to be given weight as sustained by facts detailed by them.—*In re* Wharton's Will, Iowa, 109 N. W. Rep. 492.

44. EXECUTORS AND ADMINISTRATORS—Accounting.—Where an executrix never received any portion of her intestate's estate as executrix and never filed an inventory, an administrator *pendente lite*, appointed under Rev. St. 1899, § 13, held not entitled to maintain a proceeding to compel her to account under sections 47 and 48.—Hanley v. Holton, Mo., 96 S. W. Rep. 691.

45. EXECUTORS AND ADMINISTRATORS —Counsel Fees and Costs.—Where executors resist litigation against the estate, and have reasonable grounds for believing the litigation unjust they will be allowed counsel fees and costs though they may be entitled to a remainder in the estate after the termination of a life interest.—*In re* Groff's Estate, Pa., 65 Atl. Rep. 783.

46. FORCIBLE ENTRY AND DETAINER—Prior Possession of Plaintiff.—One who has never been in possession of premises, cannot maintain unlawful detainer for the recovery thereof.—Metz v. Schneider, Mo., 97 S. W. Rep. 187.

47. FRAUDS, STATUTE OF — Agency Contract.—In an action against an agent for misconduct, the relationship of principal and agent may be established by parol notwithstanding statute of frauds.—Mucke v. Solomon, Conn., 65 Atl. Rep. 788.

48. FRAUDULENT CONVEYANCES—Bona Fide Purchaser. —Though land was conveyed in fraud of the grantor's creditors, a mortgage by the grantee to an innocent party for value was valid.—Gilcreast v. Bartlett, N. H., 65 Atl. Rep. 767.

49. FRAUDULENT CONVEYANCES—Husband and Wife.— A gift from a husband to his wife executed when the husband was solvent and not made in contemplation of insolvency, or of engaging in some hazardous enterprise, is not fraudulent against creditors, if not excessive, considering the husband's circumstances at the time the gift was made.—Harvey v. Godding, Neb., 109 N. W. Rep. 220

50. GAMING—Dealing in Futures.—Where there was no intention that grain purchased for future delivery should be actually delivered, the transaction was invalid, though the sale was evidenced by a written contract under which a legal delivery or its equivalent could be compelled.—Hingston v. Montgomery, Mo., 97 S. W. Rep. 202.

51. GIFTS—Intent.—An intent of a father to give certain land occupied by his son to him, not consummated by a conveyance, held not to constitute a gift, so as to render the land subject to the son's debts.—Oliver v. Perry, Iowa, 109 N. W. Rep. 183.

52. GROUND RENTS—Purchase of Fee.—Ground rent held not merged by purchase of the land by the owner of the rent where there is an intervening estate or charge on the land.—Frank v. Guarantee Trust & Safe Deposit Co., Pa., 64 Atl. Rep. 894.

53. GUARDIAN AND WARD—Claims Against Ward's Estate.—On application to compel a guardian to account after the death of his ward, the question of the existence of claims against the ward's estate cannot be adjudicated.—*In re* Lindsay's Guardianship, Iowa, 109 N. W. Rep. 473.

54. HUSBAND AND WIFE—Improvement of Husband's Property.—The voluntary appropriation by a wife of her money to the improvement of her husband's homestead indicates a gift on condition or expectation that the wife may occupy the property during their joint lives.—Knickerbocker Trust Co. v. Carhart, N. J., 64 Atl. Rep. 756.

55. HUSBAND AND WIFE—Separate Maintenance.—A court of equity held to have inherent power to grant a wife a separate maintenance out of her husband's estate, where she is forced to withdraw from his home for his fault.—Cureton v. Cureton, Tenn., 96 S. W. Rep. 608.

56. INJUNCTION — Specific Performance of Personal Contract.—That an employee is not financially responsible will not justify an injunction restraining a breach of her covenant not to work for others than her employer. —H. W. Gossard Co. v. Crosby, Iowa, 109 N. W. Rep. 488.

57. INJUNCTION—To Restore Right of Way.—A bill to require a railway company to restore a way which it had excavated, may be retained for the assessment of damages on refusal of the injunction.—Levi v. Worcester Consol. St. Ry. Co., Mass., 78 N. E. Rep. 853.

58. INJUNCTION—Use of Voting Machine.—A taxpayer held to have no interest demanding protection by a court of equity in the question as to whether an election shall be by ballot or voting machine.—United States Standard Voting Machine Co. v. Hobson, Iowa, 109 N. W. Rep. 458.

59. INTOXICATING LIQUORS—Evidence of Sale.—Testimony of witness as to another buying liquor from him held admissible on prosecution for keeping a liquor nuisance.—State v. O'Malley, Iowa, 109 N. W. Rep. 491.

60. JOINT ADVENTURES—Damages for Breach.—Where plaintiff broke his contract for the purchase and sale of certain mining stock for joint account, defendant had a cause of action for damages and a right to recover one-half of the expense necessarily incurred in the joint enterprise.—Davidor v. Bradford, Wis., 109 N. W. Rep. 576.

61. JUDGMENT—Dormant Judgment.—Upon the entry of a judgment in an action aided by attachment, the attachment lien is merged in that of the judgment, and thereafter is a mere incident to the judgment and ceases to exist when the judgment becomes dormant.—Harvey v. Godding, Neb., 108 N. W. Rep. 220.

62. JUDGMENT—Res Judicata.—A judgment, establishing plaintiff's status as a stockholder, held not *res judicata* of plaintiff's right to recover for the benefit of a corporation for alleged losses sustained by the mismanagement of the corporation's officers. — Hingston v. Montgomery, Mo., 97 S. W. Rep. 202.

63. JUDGMENT—Res Judicata.—An order for the sale of real estate of complainant's testator held not *res judicata* of complainant's right to have her election not to take under the will set aside for fraud.—Whitesell v. Strickler, Ind., 78 N. E. Rep. 845.

64. LANDLORD AND TENANT—Writ of Forcible Detainer. —Where a conveyance of standing timber was in effect a lease, the grantee on termination of his rights could be ejected by a writ of forcible detainer.—Alexander v. Gardner, Ky., 96 S. W. Rep. 818.

65. LIBEL AND SLANDER—Libel Per Se.—A charge that an employee was short in his accounts on the termination of his employment, made to a surety, was a charge of a criminal act against such employee. —Sunley v. Metropolitan Life Ins. Co., Iowa, 109 N. W. Rep. 468.

66. LIFE INSURANCE — Assignment.—Possession at the same time by a bank of a note executed by an insured in a life policy and of the policy, raises a presumption that the policy is held as collateral for the note.—New York Life Ins. Co. v. Kansas City Nat. Bank, Mo., 97 S. W. Rep. 195.

67. MANDAMUS—Admission to School Privileges.—Mandamus to compel school privileges held such an adequate remedy at law as to preclude injunction to restrain a threatened illegal change of text-books.—Harley v. Lindemann, Wis., 109 N. W. Rep. 570.

68. MASTER AND SERVANT — Assumed Risk.— Where plaintiff, an inexperienced servant, was injured while attempting to descend a stack on a swingboard as ordered by his foreman, plaintiff did not assume the risk as a matter of law.—Springfield Boiler & Mfg. Co. v. Parks, Ill., 78 N. E. Rep. 809.

69. MASTER AND SERVANT—Condition of Premises.—In action for injuries sustained by a servant, while on a dangerous path from a water closet, questions touching the condition of another accessible watercloset held too indefinite as to time.—Huggard v. Glucose Sugar Refining Co., Iowa, 109 N. W. Rep. 475.

70. MASTER AND SERVANT—Obvious Dangers.—A master is not bound to give warning to an employee of dangers that are subjects of common knowledge or apparent to ordinary observation.—Eisenberg v. Fraim, Pa., 65 Atl. Rep. 798.

71. MASTER AND SERVANT—Safe Place to Work.—The duty of a master to furnish his servant with a safe place to work, held inapplicable to a sand pile from which plaintiff and other servants wheeled sand, which pile was constantly changing as the work progressed.—Livingstone v. Saginaw Plate Glass Co., Mich., 109 N. W. Rep. 481.

72. MASTER AND SERVANT—Safe Place to Work.—The master is only required to exercise reasonable care to discover defects in the places provided for the servant to work, and the burden is on the servant to show a negligent breach of such duty.—Kremer v. Eagle Mfg. Co., Mo., 96 S. W. Rep. 726.

73. MINES AND MINERALS—Injury to Employee.—The owner of a mine held not liable for injuries to a miner by reason of the negligence of the certificated mine fore-

man in the performance of duties imposed by Acts 1903, ch. 237, regulating the operation of mines.—Sale Creek Coal & Coke Co. v. Priddy, Tenn., 96 S. W. Rep. 610.

74. MORTGAGES—Subrogation.—A purchaser at second mortgage sale held under the facts entitled to have the first and second mortgages restored of record and to be subrogated to the rights of the first and second mortgagees.—Home Inv. Co. v. Clarson, S. Dak., 109 N. W. Rep. 507.

75. MUNICIPAL CORPORATIONS—Local Improvements.—The municipal authorities are the sole judges of the necessity for the construction of a local improvement and the jury in proceedings to confirm a special assessment cannot determine such question.—Lingle v. West Chicago Park Comrs., Ill , 78 N. E. Rep. 794.

76. MUNICIPAL CORPORATIONS—Obstruction of Street.—Occupation of a street by a railroad company, without authority, held a public nuisance which can be restrained by a private citizen.—Edwards v. Pittsburg Junction R. Co., Pa., 65 Atl. Rep. 798.

77. MUNICIPAL CORPORATIONS—Ordinance Prohibiting Trade in Street.—Where respondent selling strawberries, pineapples and bananas out of a push car in a street, held within an ordinance prohibiting any person from carrying on any trade or business in any part of a public street.—State v. Barbelais, Me., 64 Atl. Rep. 881.

78. MUNICIPAL CORPORATIONS — Playing Games in Streets.—The playing of "tag" held not a violation of a city ordinance forbidding games, sports or amusements in the streets or on the sidewalks.—Star Brewery Co. v. Houck, Ill., 78 N. E. Rep. 827.

79. MUNICIPAL CORPORATIONS—Public Landing. — A public landing is for the benefit of the public generally, and the right to use it does not include the right to make such use of it as will deprive others of a like use.—Chicago, R. I. & P. Ry. Co. v. People, Ill., 78 N. E. Rep. 790.

80. MUNICIPAL CORPORATIONS—Tax Bills.—Special tax bills issued in payment of a street improvement held not void because of the mistake made in the ordinance and contract in naming a point at which the improvement should begin.—City of Excelsior Springs, to Use of McCormick v. Ettenson, Mo., 96 S. W. Rep. 701.

81. MUNICIPAL CORPORATIONS—Violation of Ordinance as to Firearms.—Where defendant was charged with violating an ordinance regulating the discharge of firearms which provided no penalty, and no penal ordinance was offered in evidence, defendant was properly discharged.—Town of Canton v. Madden, Mo., 96 S. W. Rep. 699.

82. NEGLIGENCE—Proximate Cause. — Negligence of defendant in constructing an elevator well, and not the act of plaintiff's fellow servant in stepping on plaintiff's foot, held the proximate cause of plaintiff's injury.—Obermeyer v. F. H. Logeman Chair Mfg. Co., Mo., 96 S. W. Rep. 673.

83. NEGLIGENCE—Proximate Cause.—Where intestate was run over by defendant's brewery wagon, defendant was liable, notwithstanding intestate's contributory negligence, if the proximate cause of his injury was defendant's failure to use ordinary care, after becoming aware of his danger.—Star Brewery Co. v. Houck, Ill., 78 N. E. Rep. 784.

84. PLEDGES—Construction of Agreement.—A transaction between assured in a life policy and one from whom he borrowed money held a pledge of the policy and not a sale.—Daly v. Spiller, Ill., 78 N. E. Rep. 782.

85. RAILROADS — Abandonment of Station. — In *mandamus* to compel a railway company to stop its trains at a depot it is threatening to abandon the question held to be whether the company had the diseretionary right to change the location of its depot.—Chicago & E. I. R. Co. v. People, Ill., 78 N. E. Rep. 784.

86. RAILROADS—Accident at Crossing.—Where a brakeman was stationed at a crossing where a freight train had been cut in two, it was his duty to exercise reasonable care to prevent injuring persons passing over the tracks.—Boyce v. Chicago & A. Ry. Co., Mo., 96 S. W. Rep. 670.

87. SALES — Representations. — Statements by selling agents that the buyers could not be compelled to take certain machinery previously ordered, held mere statements of opinion on which the buyers were not entitled to rely.—Nichols & Shepard Co. v. Horstad, S. Dak., 109 N. W. Rep. 509.

88. STREET RAILROADS—Collision with Wagon.—In an action for injuries to plaintiff in a collision with a street car the motorman held not guilty of negligence in failing to observe plaintiff's peril in time to avoid striking him.—Abbott v. Kansas City Elevated Ry. Co., Mo., 97 S. W. Rep 198.

89. STREET RAILROADS—Duty of Conductor.—It is the duty of a street car conductor before giving the signal to start to know that no one is getting on or off and the fact that he was busy within the body of the car was no excuse for his failure to perform such duty —Hurley v. Metropolitan St. Ry. Co., Mo., 96 S. W. Rep. 714.

90. STREET RAILROADS—Excessive Speed.—In an action for injuries to plaintiff's van, etc., by being struck by a street car held a question for the jury whether the speed of the car was dangerous and reckless.—American Storage & Moving Co. v. St. Louis Transit Co., Mo., 97 S. W. Rep. 184.

91. STREET RAILROADS — Forfeiture of Franchise.—A franchise of street railway company will not be forfeited because of its refusal to comply with condition subsequent which became impossible of fulfillment.—Millcreek Tp. v. Erie Rapid Transit Ry. Co., Pa., 64 Atl. Rep. 901.

92. STREET RAILROADS—Injury to Passenger on Step.—The law of assumed risk held inapplicable to an action for injuries to a street car passenger in a collision between the car and a vehicle.—Chicago Consol. Traction Co. v. Schritter, Ill., 78 N. E. Rep. 820.

93. STREET RAILROADS—Place to Alight.—A street car conductor held not guilty of negligence in failing to warn a passenger of the existence of a gutter on the side of a street where she alighted from the car.—Thompson v. Gardner, W. & F. St. Ry. Co., Mass , 78 N. E. Rep. 854.

94. SUBROGATION—Persons Advancing Money to Discharge Labor Lien.—One advancing money to manfacturing concern which is used in the payment of laborers' liens held not entitled to a preference by being subrogated to the rights of the laborers.—Bank of Commerce v. Lawrence County Bank, Ark., 96 S. W. Rep. 749.

95. TELEGRAPHS AND TELEPHONES—Delay in Transmission.—In an action to recover profits lost on an exchange of realty by defendant telegraph company's negligence, held error to direct a verdict for defendant.—Lucas v. Western Union Telegraph Co., Iowa, 109 N. W. Rep. 191.

96. TENDER—Operation and Effect.—Where a tender has been made before trial, but is not relied on in the pleadings, nor the money brought into court, the tender is an admission of liability, but not conclusive.—Mackey v. Kerwin, Ill., 78 N. E. Rep. 817.

97. TRESPASS TO TRY TITLE—Title to Support Action.—Plaintiff, in trespass to try title, must recover on the strength of his own title and proof of a superior outstanding title in a third person is a good defense, though the defendant may not claim under such title.—Mann v. Hossock, Tex., 96 S. W. Rep. 767.

98. TRIAL—Instructions.—Refusal of the court to direct a view of premises in an action for injury to a passenger thrown from a street car while rounding a curve held in its discretion.—Dupuis v. Saginaw Valley Traction Co., Mich., 109 N. W. Rep. 413.

99. WILLS—Election.—A complaint by a widow held to state a cause of action to avoid her election to take under the law and not under the will of her husband.—Whitesell v. Strickler, Ind., 78 N. E. Rep. 845.

100. WITNESSES—Physicians.—Where a physician was employed by a master to treat an injured servant, he was incompetent to testify to any admissions made by the servant under Rev. St. 1899, § 4659.—Obermeyer v. F. H. Logeman Chair Mfg. Co., Mo., 96 S. W. Rep. 673.